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90-1986

No. _____

Supreme Court, U.S.
FILED
JUN 11 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

1991 TERM

CHERIEL JENSEN,

APPELLANT & PETITIONER

VS.

AMANDA HAWES, GALLARDO, CHU & HAWES, INC.: JAMES PAUL COLLINS; STERNS, SMITH, WALKER, PENSONEN & GRELL, AND DOES 1 THROUGH 100 INCLUSIVE

APPELLEES & RESPONDENTS

Petition for Hearing and Review to the Supreme Court of the State of California

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PETITION FOR WRIT OF CERTIORARI

APPENDIX

CHERIEL JENSEN, PRO SE
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APPENDIX

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Opinions Below, Full Text

Superior Court in and for Law and Motion Calendar 1 SCV-873865 Daily Summary November 13, 1989, 9:30 am DEPT 9 SUPERIOR COURT HONORABLE IRA A. BROWN JENSEN, CHERIEL vs. HAWES, AMANDA (LAW OFFICES OF JOSEPH) (PLASTIRAS & WILSON) Motion for Summary judgment was granted based on defendants fact #7.

BASIL N. PLASTIRAS, ESQ. THOMAS RICHARD KIRVIN, ESQ. LAW OFFICES OF BASIL PLASTIRAS 220 Montgomery Street, Suite 910 San Francisco, CA 94104 Attorneys for Defendants FILED San Francisco County Superior Court JAN 4 1990 DONALD W. DICKINSON, Clerk BY BETTY A. CONNELL DEPUTY CLERK SAN FRANCISCO SUPERIOR COURT CHERIEL JENSEN PLAINTIFF, VS. AMANDA HAWES GALLARDO, CHU & HAWES, INC.; JAMES PAUL COLLINS and STERNS, SMITH, WALKER, PERSONNEN & GRELL and DOES 1 through 100., Defendants No.: 878865 ORDER AND JUDGMENT TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD: On Monday November 13 1989, at 9:30 a.m., defendant's Motion for

Summary Judgment and/or Summary Adjudication of Issues was called for hearing in the Law and Motion Department of the above-entitled court before the Honorable Ira Brown. Attorney Basil Plastiras appeared for defendants. Attorney Gary Dolinski appeared for plaintiff. Having considered all of the evidence set forth in the papers submitted, and the inferences reasonably deducible therefrom, the court determined and ordered as follows: (1) Defendant's Motion to for Summary Judgment is granted because there is no dispute as to any material fact, and therefore defendants, and each of them, are entitled to a judgment as a matter of law; (2) Defendants' Motion for Summary Adjudication of Issues is denied. Therefore, IT IS ORDERED the judgment be entered in favor of defendants and each of them. It is further ordered that defendants recover from plaintiff costs incurred in this action.. DATED NOV 27 1990 IRA A. BROWN, JR. [stamped] Judge of the Superior Court

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Superior Court in and for Law and Motion Calendar 1 SCV-873865 Daily Summary December 19, 1989, 9:30 am DEPT 9 SUPERIOR COURT Purpose RECONSIDER HONORABLE IRA A. BROWN JENSEN, CHERIEL vs. HAWES, AMANDA (LAW OFFICES OF JOSEPH) (PLASTIRAS & WILSON) Argued and Plaintiff's motion for reconsideration of ruling granting summary judgment was denied by the Court.

BASIL N. PLASTIRAS, ESQ. THOMAS RICHARD KIRVIN, ESQ. LAW OFFICES OF BASIL PLASTIRAS 220 Montgomery Street, Suite 910 San Francisco, CA 94104 Attorneys for Defendants AMANDA HAWES; GALLARDO, CHU & HAWES,

INC.; JAMES PAUL COLLINS and STERNS, SMITH, WALKER, PERSONNEN & GRELL and DOES 1 through 100. FILED San Francisco County Superior Court JAN 4 1990 DONALD W. DICKINSON, Clerk BY Christina E. Bautista DEPUTY CLERK SUPERIOR COURT COUNTY OF SAN FRANCISCO, CHERIEL JENSEN PLAINTIFF, VS. AMANDA HAWES ET AL., Defendants AND CROSS RELATED ACTIONS No.: 878865 ORDER ON MOTION TO RECONSIDER RULING GRANTING MOTION FOR SUMMARY JUDGMENT TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD: On Tuesday, December 19, 1989, at 9:30 a.m., plaintiff's Motion to Reconsider Ruling Granting Motion for Summary Judgment was called for hearing in the Law and Motion Department of the above-entitled court before the Honorable Ira Brown. Attorney Basil Plastiras appeared for defendants. Attorney Gary Dolinski appeared for plaintiff. Having considered all of the evidence set forth in the papers submitted, and the inferences reasonably deducible therefrom, the court determined and ordered as follows: Plaintiff's Motion to Consider Ruling Granting Motion for Summary Judgment is denied. DATED JAN 16 1990 By: IRA A. BROWN, JR. [stamped] JUDGE IRA BROWN Judge of the Superior Court Approved as to form: BY: [Signature] Gary Dolinski Attorneys for Plaintiff

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BASIL N. PLASTIRAS, ESQ. THOMAS RICHARD KIRVIN, ESQ. LAW OFFICES OF BASIL PLASTIRAS 220 Montgomery Street, Suite 910 San Francisco, CA 94104 Attorneys for Defendants AMANDA HAWES; GALLARDO, CHU & HAWES,

INC.; JAMES PAUL COLLINS and STERNS, SMITH, WALKER, PERSONNEN & GRELL and DOES 1 through 100. FILED San Francisco County Superior Court JAN 17 1990 DONALD W. DICKINSON, Clerk BY Christina E. Bautista DEPUTY CLERK SAN FRANCISCO COUNTY SUPERIOR COURT, CHERIEL JENSEN PLAINTIFF, VS. AMANDA HAWES; GALLARDO, CHU & HAWES, INC.; JAMES PAUL COLLINS and STERNS, SMITH, WALKER, PERSONNEN & GRELL and DOES 1 through 100. Defendants No.: 878865 ORDER DENYING PLAINTIFF'S MOTION TO RECONSIDER TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD: PLEASE TAKE NOTICE that on December 19, 1989, at 9:30 a.m., in the Law & Motion Department of the above entitled court, plaintiff's Motion to Reconsider was called for hearing before the Honorable Ira Brown, Jr. Attorney Gary Dolinski appeared for plaintiff, and Attorney Basil Plastiras appeared for defendants. After hearing oral arguments from council and after considering the moving and opposing papers, the court ruled as follows: Plaintiff's Motion to Reconsider is denied. IT IS SO ORDERED: DATED JAN 16 1990 [illegible signature] [Illegible initials] Judge of the Superior Court IRA A. BROWN, JR. [stamped]

Court of Appeal of the State of California IN AND FOR THE First Appellate District, Division Five FILED SEP 12 1990 Court of Appeal - First Dist. RON BARROW Clerk By _____ Cheriel Jensen, Plaintiff and Appellant, vs. Amanda

Hawes, et al., Defendants and Respondents. No AO48491, San Francisco Co. Sup. Ct. No. 873865

Plaintiff/appellant Cheriel Jensen appeal a summary judgment in favor of defendants/respondents Amanda Hawes, et al.,[1/] in appellant's action for legal malpractice and other alleged wrongs. She contends summary judgment was improperly granted because the trial court improperly shifted the burden of proof to her and that triable issues of material fact exist.

FACT

This is an action for legal malpractice, intentional and negligent misrepresentation, fraud and intentional infliction of emotional distress arising out of respondent's representation of appellant in Alred, et al. v. Mediterranean Fruit Fly Eradication Project, et al., a personal injury action against the State of California, state agencies involved in malathion spraying and

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[1/] Also responding are Gallardo, Chu & Hawes; James Paul Collins; and Sterns, Smith, Walker, Personen & Grell.

manufacturers and distributors of malathion, alleging appellant was injured as a result of exposure to malathion aerially sprayed over her Saratoga residence on the night of July 13, 1981. The instant action alleges appellant was damaged because the underlying case was dismissed due to respondents' failure to timely serve any of the named defendants.

Respondents moved for summary judgment on the grounds the underlying action was not meritorious because: (1) They did not expose appellant to malathion on the date claimed; (2) appellant was not exposed to malathion at all; (3) appellant's injuries were not proximately caused by exposure to malathion; and (4) the

governmental defendants were not liable as a matter of law. In support of their motion for summary judgment, respondents presented the following evidence:

In her deposition appellant testified that the only direct spraying to which she was allegedly exposed occurred on July 13, 1981. On that date she resided in Santa Clara County at 13737 Quito Road in Saratoga. Between 11:30 and 11:55 p.m. she was in her backyard taking in lawn furniture after having been instructed by the Medfly Project to take inside anything that might be damaged by malathion spraying over Palo Alto. While outside she noticed at least three helicopters flying overhead, but could not identify them. She did not see anything sprayed on her or her residence and did not see anything that looked like malathion. No one had ever told her "with certainty" that malathion was sprayed over her house on the night of July 13.

A declaration by Don Henry, the assistant project director of the Medlfy Eradication Project in Santa Clara County in July 1981, states that the Medfly Project designated the area to be sprayed during the night of July 13 and the early morning hours of July 14 as "Area 1." Appellant's residence is southeast of Area 1 and is not included within it. No malathion spraying occurred anywhere in Santa Clara County before 12:00 a.m. on July 14. A single Helicopter began spraying Area 1 after 12:00 a.m. on July 14. It took off from a field at the Gates of Heaven cemetery, located six mile northwest of appellant's residence. At approximately 1:40 a.m., the helicopter returned to base after experiencing failure of the spray pumps. These mechanical problems did not cause any accidental or unintentional discharge of malathion. No other

malathion was applied by the Medfly Project on July 14. No Medfly Project helicopter flew over appellant's residence on the night of July 13 or the early morning hours of July 14. There was no accidental or unintentional release of malathion over appellant's residence or anywhere else in Santa Clara County on he night of July 13 or the early morning hours of July 14.

A declaration of Jim Josephson, owner of the helicopter company responsible for malathion spraying in Santa Clara County in July 1981, states that he supervised the malathion spraying on July 14, the first day scheduled for spraying in Santa Clara County. He watched the helicopter take off and was in radio contact with its pilot while it was airborne. No spraying occurred on July 13 and no spraying occurred on July 14 other than over the intended area near Palo Alto.

A declaration of Robert Alderson, pilot of the helicopter that sprayed malathion on July 14, states that at no time did he deviate from the intended flight path or accidently or intentionally spray malathion over appellant's residence.

In her deposition appellant testified she suffered numbness in her arm and hands, red spots on her skin, constipation, extreme tiredness, twitching in her eyes, some difficulty breathing, arthritis, food allergies as a result of her alleged malathion exposure, and saw numerous physicians for those complaints. However, she never asked any physician if she had been exposed to malathion and cannot recall any doctor telling her that she had been so exposed.

Appellant also claims that malathion spray caused her roof to dissolve, pitting of her skylight, damage to trees on her property, and blackening of the side of her house. No one has ever told her

that malathion exposure was the cause of the roof and skylight damage, and she does not know what caused the damage to her trees.

In opposition to respondents' motion, appellant offered her deposition testimony wherein she states that on July 14 she called the Medlfy officials and asked whether they had sprayed her area the night before. She talked to an unidentified man who said it was "possible" that malathion had sprayed out over her house before they got to Palo Alto. Respondents objected to use of the unidentified person's statement on grounds of hearsay and speculation. Appellant failed to present any evidence contradicting the declarations of Henry, Josephson and/or Alderson, and failed to submit any evidence supporting her claim that she was exposed to malathion and that malathion was the proximate cause of her alleged personal injuries and property damage.

The trial court ruled that the only factual dispute concerned whether anyone had ever told appellant that malathion had been sprayed over her residence on the night of July 13, 1981, and granted summary judgment after ruling that appellant's evidence in support of the disputed fact was inadmissible.

Appellant moved for reconsideration and attempted to introduce additional evidence. The court denied the motion after determining there was no reason why such evidence could not have been presented in appellant's initial opposition.

Discussion

In essence, appellant contends the trial court improperly shifted the burden of proof to her and that question of fact exist precluding summary judgment. "If the defendants' declarations in

support of a motion for summary judgment establish a complete defense to plaintiff's action or demonstrate an absence of an essential element of plaintiff's case, and the plaintiff's declaration in reply does not show that a triable issue of fact with respect to that defense or that essential element exists, no amount of factual conflicts upon other aspects of the case will affect the result and the motion for summary judgment should be granted." (Vanderbilt Growth Fund, Inc. v. Superior Court (1980) 105 Cal.App.3d 628, 634 citation and internal quotation marks omitted.)

The party moving for summary judgment bears the burden of establishing that the claims asserted by the adverse party are entirely without merit on any legal theory. (Lipson v. Superior Court (1982) 31 Cal.3d 362, 374.) "The party opposing the summary judgment, which is supported by declarations or affidavits sufficient to sustain the motion, has the burden of showing that triable issues of fact do exist. If that burden is not sustained, summary judgment is proper." (Hoffman v. Citadel General Assurance, Ltd. (1987) 194 Cal.App.3d 1356, 1361-1362, citations and internal quotation marks omitted.)

(In order to prevail on a claim of legal malpractice, the plaintiff must demonstrate that the attorney's negligence caused the client to lose a meritorious claim. (Smith v. Lewis (1975) 13 Cal.3d 349, 361 (disapproved on other ground in In re Marriage of Brown (1976) 15 Cal.3d 838, 851 f. 14); John B. Gunn Law Corp. v. Maynard (987) 189 Cal.App.3d 1565, 1569.) In order to prevail on her alternate theories of intentional and negligent misrepresentation, fraud, and infliction of emotional distress, appellant must demonstrate that she suffered actual injury as a proximate result of

respondents' tortuous conduct. (See 5 Witkin, Cal Procedure (3d ed. 1985) §§ 679-680; 5 Witkin, Summary of Cal Law (9th ed. 1988) §§ 404, 406.) If the underlying action had no merit, respondents' omissions could not have been the proximate cause of appellant's alleged damages.

In the instant case respondents presented uncontradicted evidence that: (1) Although appellant claimed she was exposed to malathion between 11:30 and 11:55 p.m. on July 13, 1981, no malathion was sprayed anywhere in Santa Clara County on the night of July 13; (2) no Medfly helicopter flew over appellant's residence on the night of July 13 or the early morning hours of July 14; and (3) no malathion was intentionally, accidently, or unintentionally sprayed on her residence on July 13 or July 14. In light of the evidence presented by respondents, appellant failed to affirmatively show through competent, admissible evidence, that triable issue of fact exists. Her testimony that she saw three helicopters over her residence was insufficient to create a triable issue of fact since she was unable to identify them as Medlfy Project helicopters. Her unsupported conclusion that she was actually sprayed by malathion does not support her position because she did not see anything sprayed on her or her house, and she did not see anything that looked like malathion on the night in question. The court properly excluded her testimony regarding the statement by the "unidentified" man as hearsay.

We conclude that the burden of proof was not improperly shifted to appellant and that respondents presented sufficient evidence that the underlying action was unmeritorious.

Appellant asks this Court to consider numerous exhibits which were not presented to the court below. However, matters outside the record, or not presented to the lower court, cannot be considered on appeal. (Doers v. Golden Gate Bridge etc. Dist. (1979) 23 Cal.3d 180, 184-185, fn.1.; 9 Witkin, Cal Procedure (3d ed. 1985) § 250)

Affirmed. HANING, J. We concur: Low, P.J. KING, J.

Jensen v. Hawes AO 48491

Court of Appeal of the State of California IN AND FOR THE First Appellate District, Division Five FILED SEP 12 1990 Court of Appeal - First Dist. RON BARROW Clerk By _____ Cheriel Jensen, Plaintiff and Appellant, vs. Amanda Hawes, et al., Defendants and Respondents. No AO48491, San Francisco Sup. Ct. No. 873865 BY THE COURT: The Motions to submit appellant's exhibits A through V and exhibits 1 through 7 is denied. The clerk of the court is to return exhibits forthwith. Dated September 12 1990, LOW P.J., [Stamped, no signature].

Court of Appeal of the State of California IN AND FOR THE First Appellate District, Division Five FILED JAN 7 1990 Court of Appeal - First Dist. RON BARROW Clerk By _____ JENSEN, CHERIEL vs. HAWES, AMANDA ET AL.,, et al.. No AO48491, San Francisco Sup. Ct. No. 873865 BY THE COURT: The petition for rehearing is denied.. Dated September 12 1990, LOW P.J., [Stamped, no signature]. (Before LOW, P. J., King, J. and Haning, J.)

Court of Appeal of the State of California FOR THE First Appellate District, Division 5, Jensen, Cheriel, 13737 Quito Road, Saratoga, Ca 95070, JENSEN, CHERIEL vs. HAWES, AMANDA, et al., AO48491, San Francisco County No. 873865**REMITTITUR**
I, RON D. BARROW, Clerk of the Court of Appeal of the State of California, for the First Appellate District, do hereby certify that the decision entered in the above-entitled cause on December 11, 1990 has now become final.
___Appellant _√Respondent to recover costs. Witness my hand and the seal of the Court affixed at my office this March 26 1991 SEAL RON BARROW, Clerk By: P. KEELY Deputy

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First Appellate District, Division Five, No. AO48491 SO19304 IN THE SUPREME COURT OF THE STATE OF CALIFORNIA IN BANK CHERIEL JENSEN, Appellant v. AMANDA HAWES Et Al., Respondents SUPREME COURT FILED MAR 13 1991 Robert Wandruff Clerk _____DEPUTY [unsigned] Appellant's petition for review DENIED. LUCAS Chief Justice [Stamp, no signature]

United States Constitutional Issues Were Raised Below In the Following Documents:

FOURTEENTH AMENDMENT DUE PROCESS CLAUSE (DUE PROCESS):

Plaintiff Appellants Reply Brief, pages 11 and 13.

Plaintiff Appellant's Answer to Petition for Hearing and Review, p. 2, 3.

Plaintiff Appellant's Opening Brief, p. 25, 26.

Petition for Hearing and Review.

FOURTEENTH AMENDMENT DUE PROCESS CLAUSE (DISCOVERY AND TIME FOR DISCOVERY, PRESENTATION OF EVIDENCE AT THE TIME SPECIFIED BY LAW):

Plaintiff Appellants Reply Brief, pages 11 and 13.

Motion/Appellant's Index and Exhibits 1 through 7.

Motion/Appellant's Index and Exhibits A through V.

Plaintiff Appellant's Opening Brief, p. 25, 26, 27.

Petition for Hearing and Review.

SEVENTH AMENDMENT (JURY TRIAL):

Plaintiff Appellants Reply Brief, pages 11 and 13.

Motion/Appellant's Index and Exhibits 1 through 7.

Motion/Appellant's Index and Exhibits A through V.

Petition for Hearing and Review.

Plaintiff Appellant's Opening Brief, p. 26.

SEVENTH AMENDMENT (WHERE THERE IS NO TRIAL, FINDING OF FACT):

Plaintiff Appellants Reply Brief, page 11.

Motion/ Appellant's Index and Exhibits 1 through 7.

Motion/Appellant's Index and Exhibits A through V.

Petition for Hearing and Review.

FOURTEENTH AMENDMENT DUE PROCESS CLAUSE (FAIR TRIAL):

Plaintiff Appellants Reply Brief, page 11.

Petition for Hearing and Review.

FOURTEENTH AMENDMENT DUE PROCESS CLAUSE (IMPROPERLY SUPPRESSED EVIDENCE):

Plaintiff Appellants Reply Brief, page 11.

Petition for Hearing and Review.

FOURTEENTH AMENDMENT DUE PROCESS CLAUSE (REVERSAL OF THE BURDEN OF PROOF)

Plaintiff Appellants Reply Brief, page 11.

Petition for Hearing and Review.

FOURTEENTH AMENDMENT DUE PROCESS CLAUSE (MISCONSTRUING THE LAW)

Plaintiff Appellants Reply Brief, pages 11 and 13.

Plaintiff Appellant's Answer to Petition for Hearing and Review, p. 2, 3.

Petition for Hearing and Review.

FOURTEENTH AMENDMENT DUE PROCESS CLAUSE (CONFRONTATION OF WITNESSES):

Plaintiff Appellant's Opening Brief, p. 26.

Petition for Hearing and Review.

In addition, Petition for Hearing and Review was mostly a discussion of constitutional issues, including the Fourteenth Amendment Equal Protection Clause.

THERE IS NO EVIDENCE THAT ANY OF THE COURTS OF CALIFORNIA WHO REVIEWED THIS CASE EVER NOTIFIED THE STATE ATTORNEY GENERAL OF THIS CASE OR THE CONSTITUTIONAL ISSUES AS THEY RELATED TO THE CALIFORNIA STATUTES AT ISSUE.

Respectfully submitted,

June 11 1991

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Cheriel Jensen, pro se

Appellant's Index EXHIBITS A-V:

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Exh.P	Toxicology Letters, Eff. of Mala Imp, Kidneys (1989)		53-59467-474
Exh. Q	Medical Records from 1981-82, & 90	Dr. Richard Ho	475-478
Exh.R	CRC Critical Rev. in Toxic. Effect of Pesticide on Eyes		479-504
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